

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 12, 2004 Session

KATHY HILL v. MELVIN SNEED d/b/a THE MOVIE STATION, INC.

**Appeal from the Circuit Court for Rhea County
No. 20260 Buddy D. Perry, Judge**

No. E2004-00102-COA-R3-CV - FILED OCTOBER 18, 2004

Kathy Hill ("Plaintiff") filed this lawsuit after she slipped and fell while cleaning a tanning bed at Defendant's business. Plaintiff claimed she was standing on a rug and the rug slipped out from under her feet, causing her to fall onto the tanning bed. Defendant filed a motion for summary judgment claiming Plaintiff would be unable to prove an essential element of her negligence claim. The Trial Court agreed and granted Defendant's motion for summary judgment. We conclude that Defendant failed to negate an essential element of Plaintiff's negligence claim and, therefore, Plaintiff's burden to offer proof to establish the existence of a genuine issue of material fact or the existence of the essential elements of her claim never was triggered. Accordingly, we reverse the judgment of the Trial Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Reversed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Carol Ann Barron, Dayton, Tennessee, for the Appellant Kathy Hill.

Jack W. Piper, Jr., Knoxville, Tennessee, for the Appellee Melvin Sneed d/b/a The Movie Station, Inc.

OPINION

Background

This is a slip and fall case. In the complaint, Plaintiff alleges she went to Defendant's tanning salon on March 2, 1998. After the tanning session ended, Plaintiff began cleaning the tanning bed while she was standing on a rug. While Plaintiff was standing on the rug, it allegedly slipped out from under her causing her to fall onto the tanning bed. Plaintiff claimed the resulting fall caused serious and permanent injuries including, but not limited to, a dislocated right shoulder. According to the complaint:

5. The plaintiff was an invitee of the defendant by virtue of the fact that plaintiff entered the defendant's property to conduct business that would have been of a pecuniary value to the defendant; therefore defendant is directly and proximately responsible for the injuries sustained by the plaintiff.

6. The defendant owed the plaintiff a duty of reasonable care for the protection of the plaintiff, which the defendant negligently breached. The defendant knew or should have known about the dangerous slippery condition of the rug at his place of business, yet they made no attempt to repair or correct the condition or to warn the plaintiff or other patrons of the existing conditions. Defendant negligently breached his duty of care to the plaintiff, thereby proximately causing plaintiff to suffer the injuries and damages alleged herein.

Plaintiff requested damages in the amount of \$50,000 and a trial by jury.

Defendant answered the complaint and while Defendant admitted Plaintiff was a customer on the date of the alleged accident, Defendant denied that Plaintiff was injured as a result of a rug slipping out from under her feet. Defendant generally denied any liability to Plaintiff.

Defendant filed a motion for summary judgment and a memorandum of law in support thereof. In the memorandum, Defendant states: "Concerning this Motion, a party may obtain Summary Judgment by demonstrating that the adverse party will be unable to prove an essential element of its case. *Byrd v. Hall* 847 S.W.2d 208, at 212 (Tenn. 1993)." Defendant's motion states that attached to it as Exhibit "A" is Plaintiff's deposition. Defendant's motion contained in the record before us does not have attached to it as an exhibit any part of Plaintiff's deposition. No copy of Plaintiff's deposition is contained in the record before us on appeal. According to Defendant's brief, Plaintiff testified in her deposition that she was aware of the presence of the rug and she had observed the rug in the tanning bed room on prior visits. Relying on this testimony, Defendant argued:

The gravamen of the Plaintiff's Complaint is that the presence of the rug adjacent to the tanning bed created a dangerous or defective condition which amounted to a breach of the duty owed by the Defendant to Plaintiff.... The Defendant's position is that the presence of the rug was known to the Plaintiff, the rug was a type commonly used in homes and businesses being made of a low pile carpet with rubber backing, and the presence of the rug did not constitute negligence on the part of [Defendant].

Plaintiff responded to Defendant's motion and attached her affidavit, which is the only sworn testimony actually included in the record. In her affidavit, Plaintiff stated, among other things:

After my session ended and while I was leaning over the bed wiping it off, my feet were on a small, thin rug on the floor. The rug slipped causing me to fall forward. The rug that caused the fall was a small, thin, residential mat, which is sold at the local Dollar Store and was placed on a slippery floor which caused the accident.

The Trial Court granted Defendant's motion for summary judgment. According to the Trial Court, "there is not a genuine issue of material fact in this cause, there is an absence of any evidence that the rug upon which the Plaintiff slipped was defective or was inherently dangerous, and there is no proof otherwise that the Defendant was negligent...." After making these findings, Defendant's motion for summary judgment was granted and the case was dismissed.

Plaintiff appeals raising two issues. First, she claims the Trial Court erred in granting the motion for summary judgment because Defendant failed to negate an essential element of her claim and, therefore, the burden to establish the existence of a genuine issue of material fact or the necessary elements of her claim never shifted to her. Second, Plaintiff claims the Trial Court erred in granting the motion because there was a genuine issue of material fact regarding whether a dangerous condition was created when Defendant placed the small rug on a slippery floor and whether the dangerous condition was reasonably foreseeable.

Discussion

In *Blair v. West Town Mall*, our Supreme Court recently reiterated the standards applicable when Tennessee Appellate Courts are reviewing a motion for summary judgment. *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004). In *Blair*, the Court stated:

The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to

reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *See Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples*, 15 S.W.3d at 88.

* * *

When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

Blair, 130 S.W.3d at 763-64, 767 (quoting *Staples*, 15 S.W.3d at 88-89).

Our Supreme Court also has provided instruction regarding assessing the evidence when dealing with a motion for summary judgment, stating:

The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn

from the facts permit a reasonable person to reach only one conclusion. See *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000).

In *Svacha v. Waldens Creek Saddle Club*, 60 S.W.3d 851 (Tenn. Ct. App. 2001), the plaintiffs, Kimberly and William Svacha, brought claims of negligence and gross negligence against the defendants after Ms. Svacha was injured while horseback riding. More specifically, Ms. Svacha was injured when the saddle slipped causing her to fall off of the horse. *Id.* at 852. The trial court granted the defendants' motion for summary judgment relying, in part, on testimony of Ms. Svacha elicited at a hearing in May of 2000. Ms. Svacha's testimony was not transcribed and provided to this Court on appeal from the grant of summary judgment. *Id.* at 855. The defendants argued that it was the plaintiffs' responsibility to make sure this evidence was in the record on appeal. We disagreed. In so doing, we noted that while Tenn. R. App. P. 24(a) placed the primary burden on the appellant to prepare a proper record on appeal, the appellee shared some of the responsibility to make sure the record was complete. *Id.* at 855 (citing *McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989), *cert. denied*, 493 U.S. 859, 110 S. Ct. 168, 107 L.Ed.2d 125 (1989)). We noted that Rule 24(a) specifically stated that after the appellant designated the items to be included in the record on appeal, if "the appellee deems any other parts of the record to be necessary, the appellee shall, within 15 days after service of the description and declaration, file with the clerk of the trial court and serve on the appellant a designation of additional parts to be included." *Svacha*, 60 S.W.3d at 855. We then stated:

If this were an appeal after trial, we would be inclined to agree with Defendants that the burden was upon Plaintiffs to furnish the transcript of Ms. Svacha's testimony. This appeal, however, concerns the granting of summary judgment to Defendants. We accept Defendants' position that the Trial Court apparently considered Ms. Svacha's testimony in arriving at its decision to grant to Defendants summary judgment. It is a Rule 56 movant's burden to see that all proof considered by a trial court in arriving at its determination to grant a motion for summary judgment is "on file." See Tenn. R. Civ. P. 56.04. If, as in this case, a trial court relies upon oral testimony of a witness, the Rule 56 movant bears the responsibility of seeing that a transcript of that oral testimony is "on file."

We conclude that Defendants had the responsibility to make sure that the testimony upon which the Trial Court relied (at least in part) in granting their motion for summary judgment was "on file" and in the record on appeal. Without this potentially crucial evidence in the record, we cannot determine if the Trial Court properly granted Defendants' motion. We vacate the granting of Defendants' motion

for summary judgment. This case is remanded to the Trial Court for further proceedings as necessary.

Svacha, 60 S.W.3d at 856.

In the present case, we realize that if we vacate the Trial Court's judgment solely because Plaintiff's deposition testimony was not included in the record, we likely will have another appeal in the near future with the only difference being a record which contains the missing testimony. The portion of Plaintiff's deposition relied upon by Defendant consists of only a few pages, and Plaintiff does not argue that Defendant has misrepresented her testimony. Therefore, exercising our discretion and in the interest of judicial economy, we will assume Defendant has accurately described Plaintiff's testimony and proceed with the merits of the appeal.

In order for Plaintiff to prevail on her negligence claim, she must establish the following elements: "(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause." *Lett v. Collis Foods, Inc.*, 60 S.W.3d 95, 99 (Tenn. Ct. App. 2001)(quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)).

As noted previously, relying on *Byrd v. Hall* 847 S.W.2d 208, at 212 (Tenn. 1993), the stated intent of Defendant's motion for summary judgment was to demonstrate that Plaintiff would be unable to prove an essential element of her case. We first note that we disagree with Defendant's position that he successfully demonstrated that Plaintiff would be unable to prove an essential element of her case. However, this finding is not necessary to our holding because regardless of whether or not Defendant's interpretation of *Byrd* is accurate, it is clear to this Court that under *Blair v. West Town Mall*, *supra*, merely showing that a plaintiff will be unable to prove an essential element of his or her case is not a sufficient basis for obtaining summary judgment. While it can be argued that perhaps such a showing should be a sufficient basis for obtaining summary judgment, our reading of *Blair v. West Town Mall* leads us to the contrary conclusion. *See Blair*, 130 S.W.3d at 768 ("[T]he materials filed by Defendant did not affirmatively negate an essential element of Plaintiff's claim, and Plaintiff's burden to produce evidence establishing the existence of a genuine issue for trial was not triggered. Therefore, the trial court erred in granting summary judgment.").

In the present case, Plaintiff claims that Defendant was negligent in placing that particular rug on the "slippery" floor. In viewing the evidence in a light most favorable to Plaintiff, it seems clear that something happened causing the rug to slip out from under Plaintiff's feet resulting in her fall. Simply because the rug was "made of a low pile carpet with rubber backing" as claimed by Defendant does not negate Plaintiff's claim that that particular rug was inappropriate for that particular floor in the tanning bed salon and that this rug on this floor created a dangerous

condition.¹ Neither does the fact that Plaintiff had been to the tanning bed previously and had observed the presence of the rug negate any essential element of Plaintiff's claim. Defendant never affirmatively established that this specific rug on that "slippery" floor at that location was not a dangerous condition. Because Defendant failed to negate an essential element of Plaintiff's claim, the burden never shifted to Plaintiff requiring her to establish the existence of a genuine issue of material fact or the existence of the necessary elements of her claim. Therefore, the Trial Court improperly granted Defendant's motion for summary judgment.

Conclusion

The judgment of the Trial Court is reversed, and this cause is remanded to the Trial Court for such further proceedings as are required consistent with this Opinion. The costs on appeal are assessed against the Appellee Melvin Sneed d/b/a The Movie Station, Inc.

D. MICHAEL SWINEY, JUDGE

¹ The record contains no evidence to support Defendant's description of the rug and how it was made. The only evidence on this issue is Plaintiff's affidavit which states the rug was a "small, thin, residential mat ... sold at the local Dollar Store." Nevertheless, for present purposes only we will assume Defendant's description is accurate.